

**Courts, Community and Injustice:
An Introduction to the Adversarial System**

University of Rochester
Fall Term, 2006 -- PS 242
Political Science Department
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This seminar will confront the legal and social conditions that promote injustice and the ways diverse communities yield to the judicial system's failings. Our inquiry will identify how the problem of injustice is situated at the local and national levels. Foundational legal doctrines will be mined, including the shift from lawyer-free to lawyer-driven trials, right to counsel, burden of proof, and the development of plea bargaining. We will then turn to the shapers of justice and examine the problem from the perspective of the prosecutor, police, defense attorney, and judge. In the end, a view of how the system works, and does not work, will emerge. And finally, we will ask what social forces perpetuate the misdiagnosis of this state of affairs.

Response Papers: Students are required to write three papers applying the social theory and legal doctrine from readings and class discussion to communities in which chronic injustice persists. Readings and topics will be handed out the week before the papers are due (**September 26** (required); and then two of these: **November 7; November 21; December 5**).

Each essay should be (i) two pages *single spaced*; (ii) in 12 point Times New Roman font; (iii) with spaces in between paragraphs; (iv) and demonstrate a general grasp of IRAC form (Issue, Rule, Analysis and Conclusion).

Readings: Readings should take about three to four hours. A course packet, available at the book store, should be purchased, as well as three books, *Gideon's Trumpet* by Anthony Lewis and *The Meaning of the Constitution* by Holder and Holder, and *Courtroom 302* by Steve Bogira.

Final Exam: The final exam will be structured like a law school test with emphasis on citing case names and holdings to support legal reasoning.

Grading: Class Participation: 30 percent. Please come prepared to contribute one or two ideas to each class." Response Papers: 40 percent Final: 30 percent

No Class: on October 3.

Office Hours: 5 to 7 p.m. on Tuesdays. Harkness 335.

Miscellaneous: Please turn off cel phones for class. You are permitted to bring drinks.

Syllabus for “Courts, Community and Injustice”

Below is the order of the readings. At the end of each class we will discuss home work for the next. If you must miss a class, please check with a member who attended about the subsequent week’s assignment. I may add readings. Also, we may have a speaker or two which will change the schedule.

1. Course Overview

- a. **Objective:** Explain course requirements. Students should consider whether they can do the weekly work for a robust discussion before committing.
- b. **In Class:** syllabus; presentation by AB on major themes; introductions.

2. Courts: The Adversarial System and Rights

- a. **Objective:** To be aware of the basic formation of the courts.
- b. **Readings**
 - i. Handout on Set Up of Courts
 - ii. David Luban, *Why Have An Adversary System*, LAWYERS AND JUSTICE: AN ETHICAL STUDY.
 - iii. Jerome Frank, *Wizards and Lawyers*, COURTS IN TRIAL: MYTH AND REALITY IN THE AMERICAN JUSTICE SYSTEM.
 - iv. Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, LAW & SOC’Y REV. 15 (June 1967).

3. Individual Harm in Chronic Injustice

- a. **Objective:** Read theory about self presentation and preservation to analyze how people maintain face in a group and at what costs. Next week’s reading for response papers will be distributed as well. And we will discuss expectations for this in class as well.
- b. **Readings**
 - i. Marshall Frady, *Death in Arkansas*, NEW YORKER.(don’t spend as much time on this reading as the below)
 - ii. Reinhold Nieburh, chapter 1, *The Art of Living Together*; and chapter 10, *The Conflict Between the Individual and Social Morality*, MORAL MAN AND IMMORAL SOCIETY A STUDY IN ETHICS AND SOCIETY.
 - iii. Hannah Arendt, *An Expert On the Jewish Question*, EICHMANN IN JERUSALEM.

- iv. Irving Goffman, *On Face Work*, ON FACE-WORK: ANALYSIS OF RITUAL ELEMENTS IN SOCIAL INTERACTIONS.

4. The Prosecutorial Leg of the Adversarial Triangle

- a. **Objective:** To appreciate the basic prosecutorial function and its ethical responsibilities.
- b. **Readings**
 - i. Overzealous Prosecution, *Response Paper Due* **
REQUIRED
 - ii. Bennett L. Gershman, PROSECUTORIAL MISCONDUCT (2003), Chapter 4.
 - iii. Excerpt from text book (basic background)
 - iv. Ken Armstrong, 'Cowboy Bob' ropes wins but at considerable cost, CHICAGO TRIBUNE, January 10, 1999.

5. Collegiality versus Collusion

- a. **Objective:** To investigate why communities form.
- b. **Readings**
 - i. Robert Axelrod, Intro *The Problem of Cooperation*, and Chapter 3 *Chronology of Cooperation*, THE EVOLUTION OF COOPERATION.
 - ii. Richard Wrangham and Dale Peterson, chapter 4 *Legacies* and chapter 12 *Taming the Demon*, DEMONIC MALES.

6. Standing Up

- a. **Objective:** To comprehend why it is so difficult to stand up against the community. Also in class we will go over how to "brief" a case to prepare for the next class.
- b. **Readings:**
 - i. Albert O. Hirschman, *A Special Difficulty in Defining Exit and Voice*, EXIT, VOICE, AND LOYALTY,
 - ii. ____, *The Futility Thesis*, and *The Jeopardy Thesis*, THE RHETORIC OF REACTION
 - iii. Orin S. Kerr, *How to Read A Judicial Opinion: A Guide for New Law Students*

7. The Defense Leg of the Adversarial Triangle

- a. **Objective:** To learn the legal and historical bases for indigent defense under the Due Process and Equal Protection clauses.
- b. **Readings:**
 - i. Please use THE MEANING OF THE CONSTITUTION as a reference guide to read the first 14 Amendments.
 - ii. Selected readings from Dan Carter, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH.
 - iii. *Powell v. Alabama*, 287 U.S. 32 (1932) (the case of the Scottsboro boys)

- iv. Anthony Lewis, chapters 1-8, GIDEON'S TRUMPET
- v. Summaries of *Powell v. Alabama*, *Betts v. Brady*, and *Glasser v. United States*
- vi. *Griffin v. Illinois*, 351 U.S. 12 (1965)
- vii. Petition of Clarence Earl Gideon for a Writ of Certiorari, Supreme Court of the United States, October Term, 1961
- viii. *Gideon v. Wainwright*, 372 U.S. 355 (1963)
- ix. Anthony Lewis, "High Court Ruling Helps Poor Man to Freedom," N.Y. TIMES, Aug. 6, 1963

8. Implementation of Gideon

a. **Objective:** To recognize the practical application of the Sixth Amendment guarantee of counsel as defined by the U.S. Supreme Court.

b. **Readings:**

i. **Post-Gideon Cases on Right to Counsel**

- 1. Introductory text
- 2. Richard Klein, *The Emperor Gideon Has No Clothes: the Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986).
- 3. *Injustice Unchallenged*, WASHINGTON POST, Feb. 22, 2004 (editorial)
- 4. *Attention: Virginia Bar*, WASHINGTON POST, July 6, 2004 (editorial)
- 5. Dan Christensen, *No More Instant Plea Deals, Says Public Defender*, DAILY BUSINESS REVIEW, June 6, 2005
- 6. Robert Patrick, *Public defender rules are set to change*, ST. LOUIS DISPATCH, July 2, 2005
- 7. Betsy Taylor, *Public defenders grapple with increased caseloads*, Associated Press, August 1, 2005
- 8. David B. Caruso, *Money Matters in Death Penalty Defense*, Associated Press, April 7, 2004.
- 9. *The Philadelphia experience*
- 10. Betsy Taylor, *Public defenders grapple with increased caseloads*, Associated Press, August 1, 2005
- 11. Sara Rimer, *Questions of Death Row Justice For Poor People in Alabama*, N.Y. TIMES, March 1, 2000
- 12. *Attorneys drop Fort Payne capital murder case for lack of funds*, Associated Press, June 15, 2005 .

ii. **Strickland v. Washington**

- 1. *Strickland v. Washington* , 466 U.S. 688 (1984)
- 2. *United States v. Cronin*, 466 U.S. 648 (1984) and pages that follow
- 3. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc)

4. Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About the System*, WALL STREET JOURNAL, Sept. 7, 1994.
5. John Makeig, *Asleep on the job? Slaying Trial boring, lawyer says*, HOUSTON CHRONICLE, Aug. 14, 1992.
6. *In re McFarland*, 163 S.W.3d 743 (Tex. Cr. App. 2005)

9. A Hard Way and An Easy Way:

- a. **Objective:** To realize the difference that quality legal representation makes for those accused of crimes.
- b. **Reading:**
 - i. *Response Paper Due*
- c. **In Class:** “Murder on a Sunday Morning,” a documentary by Jean-Xavier de Lestrade which follows two veteran public defenders in Jacksonville, Florida, as they defend 15-year-old Brenton Butler, a black youth, who is charged with the murder of a white woman tourist. The film won the Academy Award for best documentary.

10. Plea Bargaining

- a. **Objective:** To identify incentives in the plea bargaining process.
- b. **Reading:**
 - i. “Plea bargaining in Cook County Circuit Court,” excerpts to be assigned from, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURT HOUSE (2005)
 - ii. Robert Kagan, chapter 5, “Deciding Criminal Cases,” ADVERSARIAL LEGALISM
- c. **In Class:** Frontline Documentary: The Plea. This documentary examines resolution of four cases through plea bargains with perspectives of the prosecutor, victims’ family, judge, defendant, and defense lawyer.

11. Prosecutorial Leg Revisited: Concealing the Problem

- a. **Objective:** To assess harder to see prosecutorial errors.
- b. **Reading:**
 - i. To be given out in class.

12. Judges in the Center of the Triangle

- a. **Objective:** To consider obvious errors a judge can’t make.
- b. **Readings**
 - i. **The right to an impartial judge**
 1. *Berger v. United States*, 295 U.S. 78 (1935)
 2. Note on cases involving pecuniary interest, the temptation not to hold the balance “nice, clear and true,” and the “appearance of impartiality”
 3. *Liteky v. United States*, 510 U.S. 540 (1994)

4. *Bracy v. Gramley*, 520 U.S. 899 (1997)
5. *Bracey v. Schomig*, 286 F.3d 406 (7th Cir. 2002)

ii. Racial prejudice

1. Doug Simpson, *Judge draws fire for blackface garb*, Associated Press, Nov. 11, 2003
2. Ainie Chen Sampson, Va. *Judge Resigns After Racial Remarks*, Associated Press, March 4, 2004,
3. *N.C. Chief Justice Accepts Judge's Resignation because of Jokes*, CHARLOTTE OBSERVER, September 17, 2003
4. Stan Bailey, *Parker shown with hate group leaders*, BIRMINGHAM NEWS, October 16, 2004
5. *Peek v. State*, 488 So.2d 52 (Fla. 1986)
6. *State v. Smulls*, 935 S.W.2d 9 (Mo. 1996)
7. *State v. Kinder*, 942 S.W.2d 313 (Mo. 1996)

iii. Conduct during trial

1. Reuters, Texas Commission disapproves of gun cleaning on bench (July 13, 2000)

iv. Political pressures

1. Excerpts from Bright & Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 BOSTON UNIVERSITY LAW REVIEW 759 (1995)
2. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)
3. Motion to Disqualify Present and Former Members of Jefferson Circuit Court and Jefferson District Court and to Obtain Appointment of A Special Judge From Outside Jefferson County, filed in *Commonwealth v. Bard*, Circuit Court of Jefferson County, Kentucky, November, 1993
4. *The Retention Election in Tennessee Regarding Justice Penny White*
 - a. *State v. Odum*, 928 S.W.2d 18 (Tenn. 1996)
 - b. Tennessee Conservative Union Campaign Fund, letter to voters
 - c. Tennessee Republican Party, "Just Say NO!"
 - d. Verna Wyatt, Give them Death, NASHVILLE TENNESSEAN, July 22, 1996
 - e. Jeff Woods, Public outrage nails a judge, NASHVILLE BANNER, Aug. 2, 1996
5. Nevada
 - a. Judges hurl soft-on-crime insults, LAS VEGAS SUN, Sept. 21, 1994

- b. Ed Vogel, High court hopefuls take the low road, *LAS VEGAS REVIEW-JOURNAL*, Oct. 31, 1996
- c. "Trust Justice Young" (advertisement)
- d. Nevius v. Warden, 944 P.2d 858 (Nev. 1997)
- e. Nevius v. Warden, 960 P.2d 805 (Nev. 1998)

13. Judges: Societal versus Individual Rights

- a. **Objective:** To consider a judge's responsibility.
- b. **Reading**
 - i. Ronald Dworkin, *Introduction*, *TAKING RIGHTS SERIOUSLY*.
 - ii. *Response Paper Due*

14. Beyond DNA: The Problem of Chronic Injustice

- a. **Objective:** Please come to class prepared to pick five to 10 ways to measure injustice and defend your reasons for choosing.
- b. **Readings:**
 - i. Emily Bazelon, *Sentencing by the Numbers*, *NEW YORK TIMES*, January 2, 2005
 - ii. North Carolina Indigent Defense Services, *The Challenge: Evaluating Indigent Defense Conference Report*, March 2005.
 - iii. Vera Institute, *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector*, November 2003.
 - iv. Barry Scheck, Peter Neufeld and Jim Dwyer, *Reckonings, An Update*, *ACTUAL INNOCENCE*
 - v. The Spangenberg report for Georgia, pp. i-v.